A

AFFIN BANK BHD

v.

MMJ EXCHANGE SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[SUIT NO: D8-22-1712-2007]
8 APRIL 2011

C ***RESTITUTION:*** *Money paid under mistake - Recovery of - Signatures of bank's customer forged to apply for banker's cheques - Cheques paid by third parties into account of money-changer to pay for purchase of foreign currencies - No contractual nexus between bank's customer and money-changer - Bank never intended to pay money-changer*
D *- Whether bank entitled to refund monies paid - Whether money-changer derived benefit from transaction - Whether bank negligent or careless in not inquiring into truth of mandate to pay money-changer - Factors to consider - Whether money-changer a bona fide party - Whether any change of position on money-changer's part - Contracts Act 1950, s. 73*

E ***BANKING:*** *Cheques - Forged signatures on remittance forms - Money paid under mistake - Recovery of - Signatures of bank's customer forged to apply for banker's cheques - Cheques paid by third parties into account of money-changer to pay for purchase of foreign currencies - No*
F *contractual nexus between bank's customer and money-changer - Bank never intended to pay money-changer - Whether bank entitled to refund monies paid - Whether money-changer derived benefit from transaction - Whether bank negligent or careless in not inquiring into truth of mandate to pay money-changer - Factors to consider - Whether money-changer a*
G *bona fide party - Whether any change of position on money-changer's part - Contracts Act 1950, s. 73*

The first defendant ('MMJ') and another company, Pyramid Triways Sdn Bhd ('Pyramid') were money-changers. Whenever it was short on foreign currencies, Pyramid would buy them from
H MMJ at special prices. In early August 2007, MMJ received requests from Pyramid to buy, on the first occasion, RM150,000 worth of Singapore dollars and, on the second occasion, RM185,630 worth of Euros and Singapore dollars. MMJ delivered the currencies to Pyramid after confirming that a first sum of
I RM144,350 and, later, a second sum of RM185,630, for the purchase of the said currencies, had been banked into its account.

During the trial, a director of Pyramid ('DW3') testified that Pyramid's requests to purchase the currencies were made for the benefit of one of its clients. DW3 said that the client was given MMJ's account number and other particulars for him to bank in the requisite payments for the purchase of the currencies. The bank-ins had been made by way of two banker's cheques issued by the plaintiff. One cheque was for the amount of RM144,350 while the other was for RM185,630 (collectively called 'the monies'). It was only discovered after the cheques were cleared and the currency purchases had been made that the application forms for the two banker's cheques contained forgeries of the authorised signatories of one of the plaintiff's customers, Xian Jiang Trading Sdn Bhd ('Xian Jiang'). Xian Jiang had no dealings whatsoever with MMJ. Upon discovering that Xian Jiang had not applied for the two banker's cheques, the plaintiff made a police report, replaced the monies it had debited from Xian Jiang's account and filed an action to recover the monies that had been paid to MMJ. The plaintiff withdrew its action against the second defendant.

The plaintiff premised its claim on several causes of action, *ie,* (i) that the monies were paid under a mistake of fact (ii) that the recovery was of money had and received by MMJ (iii) that MMJ did not receive the monies in good faith and neither was it a *bona fide* party (iv) that MMJ did not give any consideration either to the plaintiff or to Xian Jiang for receipt of the monies and (v) that the monies were paid pursuant to forged documents and fraud. The plaintiff relied *inter alia* on s. 73 of the Contracts Act 1950 to say that the monies paid under a mistake of fact must be refunded by its recipient. The plaintiff contended that it paid the monies on the honest assumption that there was a genuine application by Xian Jiang to pay MMJ. In its defence, MMJ submitted that the plaintiff had no *locus standi* to initiate and maintain the action as there was never a contractual nexus between them and also because the monies MMJ had received were not the plaintiff's but that it was debited from Xian Jiang's account. MMJ said it was just an innocent recipient or 'conduit pipe' through which the monies passed to the real culprit(s) and that it had not received any benefit. It also claimed that it had no knowledge of the scheme to cheat and should not be held accountable as the monies received had been dissipated.

Held (allowing the claim with RM50,000 costs):

(1) MMJ was not entitled to retain the monies mistakenly paid into its account and the plaintiff was entitled to their repayment regardless of how careless or negligent it might have been in not inquiring into the truth of the mandate to pay MMJ. (paras 45 & 43)

(2) MMJ was not a mere conduit or innocent by-stander unaware of the happenings at Pyramid. MMJ derived benefit in that it had received payment for the currency transactions with Pyramid which undoubtedly involved an element of profit. (para 41)

(3) MMJ was supposed to have received payment for the transactions from Pyramid, but it did not. The payment was from Xian Jiang who played no part in the transactions and had no intention to pay or have any obligation to pay MMJ. To allow MMJ to retain the monies would amount to an unjust enrichment. In such circumstances, there was no alteration of MMJ's position such as to deny the plaintiff of the remedy sought nor was there the presence of consideration. (para 41)

(4) The sale of the foreign currencies to Pyramid was not a bar to the plaintiff's claim. It did not spell a change in position as MMJ had not given or parted with the monies received to a *bona fide* third party from whom it could not seek a refund. (para 42)

(5) Since neither Xian Jiang nor the plaintiff had ever intended MMJ to keep and use the monies received, MMJ must return those monies to Xian Jiang or to the plaintiff. (para 47)

Case(s) referred to:

Abdul Rashid Maidin & Ors v. Lian Mong Yee [2008] 1 CLJ 1 CA ***(refd)***

Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim [1998] 2 CLJ Supp 332 HC ***(refd)***

Barclays Bank Ltd v. WJ Simms Son & Cooke (Southern) Ltd and Another [1980] 1 QB 677 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Cocks & Others v. Masterman & Others [1829] 9 B & C 900 ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Hasmah Abdul Rahman v. Kenny Chua Kien Lam [2006] 2 CLJ 1029 CA ***(refd)***
Imperial Bank of Canada v. Bank of Hamilton [1902] AC 49 ***(refd)***
Kelly v. Solari [1841] 9 M & W 54 ***(refd)***
Lipkin Gorman v. Karpnale Ltd [1991] 2 AC 548 ***(refd)***
National Westminster Bank Ltd v. Barclays bank International Ltd and another [1974] 3 All ER 834 ***(refd)***
New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd, New Hebrides (in liquidation) [1987] 2 MLJ 57 ***(refd)***
Tahan Steel Corp Sdn Bhd v. Bank Islam Malaysia Bhd [2004] 6 CLJ 25 HC ***(refd)***
The London and River Plate Bank Limited v. The Bank of Liverpool, Limited [1895] 1 QB 7 ***(refd)***
United Bank of India v. AT Ali Hussain & Co AIR [1978] Cal 169 ***(refd)***

Legislation referred to:
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 14
Contracts Act 1950, s. 73
Money-Changing Act 1998, ss. 2, 4

For the plaintiff - CP Lee (Alvin Lai with him); M/s Sidek Teoh Wong & Dennis
For the 1st defendant - Loganathan Manickam; M/s Ganendrah & Assocs

[The Money-Changing Act 1998 has been repealed by the Money Services Business Act 2011 (Act 731).]

Reported by Ashok Kumar

JUDGMENT

Mary Lim J:

[1] The 1st defendant received two banker's cheques; one dated 3 August 2007 and bearing the sum of RM144,350, the other dated 9 August 2007 bearing the sum of RM185,630. Both cheques were issued pursuant to remittance forms which contained forged signatures of the authorized signatories of a company known as Xian Jiang Trading Sdn Bhd (Xian Jiang). When the plaintiff discovered that Xian Jiang had not issued those remittance application forms, it made a police report; returned those two sums into Xian Jiang's account and, pursued the current action against the 1st defendant in order to recover the same. The plaintiff has premised its claim on several causes of action:

A (i) that the 1st defendant did not receive the monies in good faith and was not a *bona fides* party;

(ii) that there was no consideration from the 1st defendant to the plaintiff or to Xian Jiang or to the nominees or agent of the
B plaintiff or Xian Jiang;

(iii) that the two payments were made pursuant to forged documents and perpetrated by fraud;

(iv) that the monies were paid under a mistake of fact; and
C

(v) recovery of money had and received.

Locus Standi Of The Plaintiff

[2] By way of a preliminary issue, the 1st defendant challenged
D the *locus standi* of the plaintiff in bringing the present action. Mr. Loganathan Manickam, learned counsel for the 1st defendant contended that the plaintiff had neither the necessary *locus standi* to initiate nor to maintain this action. There was no contractual nexus between the plaintiff and the 1st defendant nor was there
E what was described as "any trace of a 'tortuous' liability" pleaded against the 1st defendant. As mentioned earlier, the monies received by the 1st defendant were debited from the account of Xian Jiang, a third party. That being the case, it was argued that it would have made sense if this action was brought by Xian
F Jiang; but not where it was initiated by the plaintiff bank. There was also no evidence that the two sums had been credited into Xian Jiang's account. In the absence of any police investigation, handwriting expert's report, bank statement or any proof, the 1st defendant invited the court to conclude that Xian Jiang's account
G had not been credited at all. The plaintiff therefore did not suffer any loss for which it can initiate and maintain the present claim.

[3] Miss CP Lee, learned counsel for the plaintiff invited the court to disregard this issue because it was not pleaded. With
H respect, I disagree. This is an issue that can be addressed by the court regardless. In fact, the court must as it is an extremely important issue which affects the proper conduct of this action.

[4] On the facts and the applicable law, I find that the plaintiff
I has the necessary *locus standi* to initiate and maintain this claim. There is clear cogent evidence from the plaintiff's witnesses that the plaintiff has credited the sums into Xian Jiang's account following the realization of what had happened. The plaintiff had

called six witnesses, three of whom were from Xian Jiang itself. They were Mr. Chung Shan Kwang, Miss Lee Mee Hong, and Mr. Tan Toh Heong.

[5] As the Managing Director of Xian Jiang, Mr. Chung Shan Kwang (PW2) was in charge of the day-to-day running of the company, including operations. He is the person who would give the necessary instructions and approvals for any banker's cheque applications that Xian Jiang may require. He instructs PW3, the person who actually handles the banker's cheque applications for Xian Jiang. It was PW2's testimony that he never gave instructions for the application of the banker's cheques in question; that the signatures on all the application forms were not his but were forged; that both Wong Yue Sie and Leong Yong Kheng were not Xian Jiang's employees; and that he did not know both gentlemen. These two persons had purportedly carried respective letters of authorization dated 3 August 2007 and 9 August 2007 when dealing with the plaintiff. PW2 categorically denied that those letters were issued by Xian Jiang. In fact, Xian Jiang had no relationship with the 1st defendant, then or now, be it business or any other, for there to be any payment to the 1st defendant. He also does not know the 1st defendant. The position was the same with respect a company known as Pyramid Triways Sdn Bhd. PW2 further testified that since discovering the deductions from Xian Jiang's account, and protesting the same to the plaintiff *vide* letter dated 14 August 2007, the plaintiff had credited the two amounts into Xian Jiang's account.

[6] PW2's evidence was confirmed by both Miss Lee Mee Hong (PW3) and Mr. Tan Toh Heong (PW4). PW4 was another director of Xian Jiang. He was responsible for the management, administration and liaison of Xian Jiang. He, too, told the court that he had not instructed PW3 to apply for any banker's cheques to the 1st defendant as Xian Jiang had no relationship with the 1st defendant and he did not know the 1st defendant. He was also aware that their remittance application forms would usually be typed as opposed to be handwritten, as was the case here. He similarly denied that the signatures appearing in the forms were his. He also told the court that a demand for refund was made to the plaintiff and the bank paid "after we have a discussion, meetings and together with our lawyers that happened after the incident was about two months after our discussion, the settlement". He, too, confirmed that Xian Jiang's money had been credited back into its account by the plaintiff.

[7] As for PW3, she confirmed PW2's evidence. As Xian Jiang's Accounts Executive, her tasks included handling applications for banker's cheques for Xian Jiang. She told the court that she is the only person at Xian Jiang who handles such applications. Her practice in respect of such applications was "to type on the said application form. I do not write on the application form". PW3 testified that PW2 did not instruct her to prepare any applications for banker's cheques at the material time; certainly not the ones under examination. She also testified that Xian Jiang made an average of one application per month for banker's cheques and such applications usually were for "a few thousand only". She also denied preparing the letters of authorization presented by Wong Yue Sie and Leong Yong Kheng to the plaintiff. It was her evidence that such letters of authorization were not necessary because Xian Jiang had already authorized one Mr. Sugakumaran a/l Muniday and in his absence one Mr. Selvakumaran a/l Kuppermuthu to collect Xian Jiang's banker's cheques. Both Mr. Sugakumaran a/l Muniday and Mr. Selvakumaran a/l Kuppermuthu were employees of Xian Jiang and their duties involved handling dispatch work. Upon being shown the relevant application forms, PW3 denied that these forms were completed by her. She was quite certain about this because the relevant forms tendered in court were completed by hand while according to her, she always typed-in the details. In fact, it was precisely this single feature that alerted the plaintiff's employee, Puan Maizurah binti Hamzah in the first place to the discrepancy and the unearthing of the forgery subsequently.

[8] The 1st defendant sought to discredit these witnesses; in particular, PW1 and PW4 by suggesting that no payment had been made by the plaintiff and the parties had some "kind of arrangement". In my view, this is pure speculation on the part of the 1st defendant. It transpired that the plaintiff held discussions with Xian Jiang which culminated in a settlement agreement. In essence and for the purpose of this case, as explained by PW4, Xian Jiang agreed to "co-operate with the bank in any event if they require us to be as a witness". Hence, the reason for the presence of PW2, PW3 and PW4 in court to testify on behalf of the plaintiff. I do not find anything wrong with the arrangement or understanding reached between the plaintiff and these witnesses from Xian Jiang. It is a perfectly good and sound arrangement and nothing negative should be read into it. Even if there was no arrangement, these witnesses could easily have been subpoenaed.

The arrangement or understanding simply avoids taking such a step. In any case, I find all three witnesses here truthful. From the stance and the submissions made by the 1st defendant, I find that the matter of the forged applications is not in serious contention. It is more of a given. The only issue is whether the 1st defendant has to refund the monies received for the reasons argued by the plaintiff.

[9] In any event, there is also the evidence of Puan Norshahrizan binti Abdullah (PW6), the Manager of the plaintiff's Main Branch at the material time. She made a police report on 14 August 2007 after its customer, Xian Jiang complained that it never authorized the three remittances in question and that it never authorized "Wong Yue Sie" and "Leong Yong Kheng" to collect the banker's cheques in question. In a second police report made shortly on 17 August 2007, she added that monies had been paid out to the defendants under two of three remittance applications. The third banker's cheque prepared on 14 August 2007 was stopped and cancelled after the plaintiff received direct instructions from Xian Jiang. PW6 also informed the court that the two amounts paid to the defendants have since been credited back into Xian Jiang's account.

[10] The plaintiff's act of crediting the relevant sums back to Xian Jiang is proper and reasonable given the circumstances. In any case, it is not the defendant's suggestion that the plaintiff should not have credited the monies back to Xian Jiang. Rather, the suggestion is – on a claim for money had and received; the plaintiff must prove that it is the plaintiff's money that was taken. Here, since it was Xian Jiang's account that was debited, it was Xian Jiang whose money was lost. With respect, I disagree. To me, for the reasons explained by the plaintiff, and with the evidence of PW6, PW2 and PW4, there is sufficient evidence before the court to prove that the plaintiff has the necessary *locus standi* to initiate and maintain this action.

The Transactions

[11] This is how the monies came to be paid into the 1st defendant's account. For this, I will have to recount the versions as offered by the plaintiff and the 1st defendant. In the case of the 1st defendant, I will have to set out the transactions as told by two money-changers, the 1st defendant and another known as

Pyramid Triways Sdn Bhd (Pyramid Triways) as the payments concerned the transactions the two companies were involved in at the material time.

[12] At the material time, the 1st defendant was a money-changer licensed under the Money-Changing Act 1998 (Act 577). Encik Mohamed Zafrulla bin D Abdul Rahim (DW1) was the person who set up the 1st defendant. DW1 testified that he had been in the money-changing business for more than 15 years. The transactions under scrutiny were those that the 1st defendant had with a company known as Pyramid Triways. Mohd Thameem Ali bin Syed Ibrahim (DW3), a director of Pyramid Triways informed the court that Pyramid Triways had been in the same business as the 1st defendant for the last five years. During this time, Pyramid Triways had approached the 1st defendant whenever it was short on foreign currencies with a view to buying such currencies from the 1st defendant. The 1st defendant is said to offer Pyramid Triways "wholesale" prices for such purchases.

[13] This was Pyramid Triways' version of the transactions as told by DW3. He told the court that he was approached by one Mr. Leong Yong Kheng on 3 August 2007 who, after inquiring about the exchange rate, purchased RM150,000 worth of Singapore Dollars. Because the amount was substantial, DW3 said he made a photocopy of Leong's identity card and also took down Leong's hand-phone number. He then contacted DW1 for his exchange rates for Singapore Dollars as he did not have the amount required by this Leong Yong Kheng (Leong). After negotiating with DW1, he agreed to purchase the Singapore Dollars from DW1. DW3 then gave Leong the 1st defendant's name and account details so that Leong could make the requisite payment into the 1st defendant's account. According to DW3, this was the mode deployed when dealing with exchanges involving large sums. RM150,000 was considered a substantial amount by DW3. If a bank draft was used to pay for the purchase, a 3-day clearing period was required. After Leong had made the payment, he showed DW3 the bank-in slip. But, since Leong had only banked-in a sum of RM144,350 with the difference to be a cash payment at the time of collection, DW3 alerted DW1 by telephone of the same. After three days, DW1 telephoned DW3 to say that the cheque had cleared and that the sum of SD65,445 was ready for collection. DW3 accordingly contacted Leong at the number

given. At which time, Leong supposedly requested for additional foreign currencies in Euros and Singapore Dollars to the value of RM185,630. Leong further informed DW3 that he would collect all the currencies exchanged at one and the same time. The process of payment into the 1st defendant's account was then repeated. Again, after Leong had made the second payment and shown DW3 the bank-in slip, DW3 telephoned DW1. On 13 August 2007, DW1 telephoned DW3 to inform him that the Euros and Singapore Dollars required would be sent to DW3's shop that same afternoon. While waiting at DW3's shop for the exchanged currencies to be delivered, Leong is said to have told DW3 that he had one more cheque of RM172,770 to be exchanged into Singapore Dollars. Again, DW3 followed the same procedure as recounted earlier in respect of this latest exchange purchase. When the currencies from the earlier two transactions were delivered by DW1's employees, Leong collected them and left. On 17 August 2007, DW1 telephoned DW3 to inform him that the cheque for the sum of RM172,770 had been stopped. According to DW3, Leong has never been seen again.

[14] This was DW1's version of those transactions. On 3 August 2007, DW3, a director of Pyramid Triways with whom he had done business before, telephoned him about exchanging RM150,000 worth of Singapore Dollars. After DW1 and DW3 had agreed on the rates, DW1 asked DW3 to bank in the requisite sum into his account at Maybank. The parties had used this mode of transacting before and so DW3 knew DW1's banking details. According to DW1, it was safer to transact in this way whenever large sums were involved. In this way, cash or banker's cheques could be banked into its account directly. After payment had been made, DW3 telephoned DW1 to inform him that only RM144,350 had been paid in whereas the balance of RM5,650 will be paid in cash. On 6 August 2007, Mohd Ariff bin Mohd Hussein (DW2), the 1st Defendant's Accounts Assistant, who attends to such matters for DW1, went to the 1st defendant's bank at Maybank and obtained a copy of the daily print-out. The print-out verified that the relevant payment had been made. With this verification, DW1 arranged for DW3 to collect the RM150,000 worth of Singapore dollars. However, DW3 placed further orders for Euros and Singapore Dollars to the total value of RM185,630 and requested to collect all the

currencies at the same time. The process of payment for this latest exchange purchase into the 1st defendant's account was then repeated. After DW2 had obtained verification from the bank that the sum of RM185,630 had been paid into the 1st defendant's account at Maybank, DW1 arranged for the Euros and Singapore Dollars to be sent to DW3 on 13 August 2007. After the currencies had been sent, DW3 placed another order for Singapore Dollars to the value of RM172,770 and made similar arrangements for the payment to the 1st defendant. However, on 17 August 2007, DW2 returned from Maybank with news that the cheque for RM172,770 had been stopped. There are receipts for all these currency purchases issued by the 1st defendant to Pyramid Triways. DW1 has never met Leong/Wong and informed the court that he was not aware of the identity of Pyramid Triways' customer nor did he or the 1st defendant have any dealings with Xian Jiang.

[15] At the plaintiff's end, this was how the whole forgery was discovered. Puan Maizurah binti Hamzah (PW5) was working as a Customer Support Officer at the Plaintiff's Main Branch in 2007. At that material time, her primary duty was to handle fixed deposits and occasionally, relieve other officers either during lunch time or when they are on leave. During this time, she handled transactions such as remittance payments and banker's cheque applications.

[16] At lunch time of 14 August 2007, PW5 was on relief duty. After the banker's cheque for RM172,770 had been issued, she noticed that the related remittance application form had been completed by hand instead of being type-written, as was the usual practice of Xian Jiang. PW5 informed the court that she was familiar with Xian Jiang since it had been the plaintiff's customer since she joined the plaintiff in 1996. She said she then "immediately" called Miss Lee Mee Hong (PW4), the contact person of Xian Jiang "to verify the transaction". PW5 was then informed by PW4 that "Xian Jiang did not apply for remittance of banker's cheque for RM172,770 to the 1st defendant and Xian Jiang did not authorize Mr. Leong Yong Kheng to do the banker's cheque for Xian Jiang. Ms Lee also told me that Xian Jiang had no dealings with the 1st defendant." She then faxed the relevant form to Xian Jiang for clarification and verification. After seeing them, PW4 informed PW5 that the signatures in the letter dated

14 August 2007 at P15 and the application form at P14 were forged and the person named therein 'Mr. Leong Yong Kheng' was not an employee of Xian Jiang.

[17] Upon learning this, PW5 who by now had done some checking informed PW4 that there were two previous transactions all involving applications by Xian Jiang. The first was on 3 August 2007 for banker's cheques of RM87,520 in favour of the 2nd defendant, and RM144,350 in favour of the 1st defendant. The second was on 9 August 2007 for banker's cheques of RM147,350 in favour of the 2nd defendant, and RM185,630 in favour of the 1st defendant. She then faxed all the relevant documents to Xian Jiang. Once again, PW5 was told by PW4 that the signatures on the relevant documents were also forged, and the persons named in the documents, 'Wong Yue Sie' and 'Leong Yong Kheng' were not employees of Xian Jiang. Xian Jiang then sent a letter dated 14 August 2007 to the plaintiff wherein Xian Jiang categorically stated that it "did not authorize remittance of banker's cheques for the sum of RM144,350 and RM185,630 in favour of the 1st defendant." Upon receipt of this letter, the plaintiff instructed that the relevant banker's cheques be cancelled and stopped.

Are The Application Forms Forged?

[18] This matter needs to be addressed and get out of the way so that the rest of the issues may be considered. Mr. Harcharan Singh a/l Tara Singh (PW1), a forensic consultant specializing in the examination of handwriting and signatures gave evidence on the signatures found in the relevant (impugned) documents. He compared these signatures with those found in the originals of several documents belonging to Xian Jiang (standards). It was his opinion "based on a conclusion reasonably ascertained by microscopic examination and observations reasoning and reasons, and based on my experience and knowledge as a forensic consultant" that the signatures in the impugned documents "do not have common authorship" with the standards. In short, Xian Jiang's signatures were forged.

[19] I have carefully evaluated PW1's evidence, examined the line of cross-examination undertaken by the 1st defendant's counsel and considered learned counsel's submissions and as observed earlier, it is quite apparent that the issue of the relevant remittance

forms being forged is not in serious dispute. In any case, from my observation, the relevant documents are clearly forged. It is however, not clear who forged these documents. It goes without saying that this Leong or Wong if indeed these are their real names, were not called. Be that as it may, for the purpose of this claim, the issue is whether the 1st defendant is implicit in the forgery or the larger scheme of things, so to speak and, whether it should return those monies to the plaintiff.

[20] Although somewhat obvious, I shall nevertheless put this on record to avoid any confusion and for better appreciation of the facts and deliberations. The plaintiff has withdrawn its action against the 2nd defendant. With this, the references by the witnesses of both parties in relation to that defendant will naturally be ignored.

Money-Changing Act 1998 (Act 577)

[21] The plaintiff has invited this court to treat the 1st defendant's transactions with Pyramid Triways as described above as contravening the provisions of the Money-Changing Act 1998 (Act 577). The plaintiff says the payments for the currency exchange purchases under scrutiny using banker's cheques paid into the 1st defendant's account violates Act 577 which only envisages "hard cash" transactions. Since the transactions are in violation of Act 577, the plaintiff submitted that the 1st defendant did not receive the monies in good faith and neither was it a *bona fides* party. No consideration was said to have flowed from the transactions and with the relevant documents proven as forged and perpetrated by fraud, the 1st defendant was obliged to return the monies in question to the plaintiff.

[22] Learned counsel relied on the information displayed by Bank Negara on its web-site as the source of this proposition. The precise information comes from Bank Negara's website. Under its "FAQs" (Frequently Asked Questions) the plaintiff sought to rely on the answers given in relation to two questions:

> **1. What is the permissible business scope of licensed money-changers?**
>
> Under the Money-Changing Act 1998, money-changers are only allowed to exchange foreign currency against the ringgit or against other foreign currency, all in hard cash, within Malaysia.

This also includes the buying of travelers' cheques.

4. Can I pay the licensed money-changer to exchange my desired currencies in other payment instruments other than cash?

No. Customers are only allowed to pay cash at the approved premises of the licensed money-changers. Crediting payment into money-changers' accounts is not allowed.

All licensed money-changers must conduct their transactions with their customers to exchange the currencies in hard cash only.

[23] This is a summary of the 1st defendant's response on these issues. Learned counsel suggested that from the circumstances of the transactions, particularly with Leong/Wong choosing to do the banker's cheque transactions at lunch-time when the bank's staff would be reduced, it would appear that the *modus operandi* of Leong/Wong was to chose money-changers accounts to siphon-off Xian Jiang's money. This does not however mean or imply that the 1st defendant and DW3 are complicit or involved in the alleged forgery or scheme.

[24] In my judgment, while the court may take judicial notice of the existence of a website set up by Bank Negara, the Central bank of Malaysia, in my view that would be the extent of that notice. Whether the contents of the web-site would be taken judicial notice of to the extent of binding the court is quite something altogether. When Abdul Malik Ishak J (as his Lordship then was) said in *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2004] 6 CLJ 25 that he could take judicial notice of the website, of "almost everything", his Lordship elaborated it was in respect:

> ... of those matters which men of ordinary and average intelligence would be acquainted with (*Byrne v. Londonderry Tramway Co* [1902] 2 IR 457 at p 480; *Loughney v. Caledonian Rly Co* [1902] 39 SCLR 289; and *Hoare v. Silverlock* [1848] 12 QB 624 at p 633). It is permissible for me to take judicial notice of how certain business are being carried out. It would not be out of place for me to take judicial notice of the following state of affairs:
>
> (a) as to the normal banking hours ...;
>
> (b) as to how a broker would function at the stock exchange ...;

A (c) as to the common practice of legal practitioners who specialize in conveyancing …; and

(d) as to the risks peculiar to certain trades …

[8] Generally speaking, I can rely on my own knowledge of the
B local affairs (*Ingram v. Percival* [1969] 1 QB 548; [1968] 3 All ER 657). Those who are computer literate would certainly log on to the website to garner knowledge and information. And this I can surely take judicial notice of.

C **[25]** Here, the information under examination was not only obtained after close of evidence without the benefit of being put to the witnesses; this information pertains to the interpretations of the provisions of Act 577 and even then, it is provided under cover of a "FAQ". The court can take judicial notice that there is
D a section on FAQs in Bank Negara's website where answers are provided to those FAQs; and that one of those FAQs which happens to be of interest to the plaintiff here concerns the interpretation and operation of Act 577. That, however, is neither here nor there. The provider of the answer was not called to give
E evidence. In fact, the plaintiff had sent emails to the Director of Foreign Exchange Administration Department, Bank Negara which remained unanswered. It goes without saying that the task of interpreting Act 577 is surely one for the court and not Bank Negara. With respect, while their views may be offered for
F consideration, it is certainly, not in the least binding. These are the provisions of ss. 2 and 4:

2. In this Act, unless the context otherwise requires:

"exchange transaction" means an exchange of one foreign currency with ringgit or with another foreign currency;
G

"foreign currency" means currency notes and coins which are legal tender in any territory outside Malaysia, excluding the foreign currencies set out in the First Schedule;

H (3) For the purposes of this Act, "money-changing business" means:

(a) the business of entering into an exchange transaction at a rate of exchange;

I (b) the business of buying travelers' cheques at a rate of exchange; or

(c) such other business as the Minister may prescribe.

[26] From these provisions, I am not convinced that all exchange transactions can only be executed in hard cash; and specifically, the exchange transactions practiced in the manner or form by the 1st defendant and Pyramid Triways, are unlawful. No officer from the relevant department at Bank Negara was called to explain the operations and monitoring of money-changing in the country, the dos and don'ts, existence of guidelines and the like; the impact of non-compliance. In any case, the arrangements using banker's cheques are as good as cash.

[27] Aside from the above submissions, the plaintiff's counsel also offered evidence in the course of her submissions on the revocation of the 1st defendant's licence under Act 577. She further contended that both the 1st defendant and Pyramid Triways either directly or indirectly facilitated and/or abetted the 'fraud' and/or 'forgery' which resulted in the payment of the monies into the 1st defendant's account. Learned counsel did not confine her arguments to the operations of Act 577 but extended it beyond the pale of the pleaded case. She raised arguments concerning Act 577 and Bank Negara's "rulings" being efforts to *inter alia* combat money-laundering; that cheating and forgery are examples of money-laundering pursuant to the Second Schedule of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. She took the view that since the 1st defendant and Pyramid Triways as money-changers are "reporting institutions" within the definition of the First Schedule of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, they are obliged under s. 14 to *inter alia* promptly report to the competent authority on suspicious transactions. The present transactions were said to be suspicious because the amounts of foreign currencies purchased were large; that Leong, a stranger never asked for any receipts or acknowledgments from Pyramid Triways after paying-in such large sums on 3 August 2007 and 9 August 2007; when the foreign currencies were ready for collection, Leong purportedly opted to defer collection and proceeded to make a further substantial purchase of foreign currency, again without requiring any receipt or acknowledgment of payment. Relying on the Supreme Court decision in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, learned counsel contended that with the weight of such evidence, that DW1 and DW3 were "dishonest and untruthful witnesses", the cumulative inference from all these facts suggested

that the transactions were tainted with illegality and therefore void and unenforceable. The 1st defendant was not entitled to keep the sums received and as a party who is in *pari delicto*, it must accept that the loss lies where it falls – *Hasmah Abdul Rahman v. Kenny Chua Kien Lam* [2006] 2 CLJ 1029; *Abdul Rashid Maidin & Ors v. Lian Mong Yee* [2008] 1 CLJ 1. The 1st defendant was then expected to purge the gains and return the same to the plaintiff.

[28] With respect to learned counsel, there is almost a death-defying quantum leap from the primary allegations which found the cause of action of the plaintiff to the extensive arguments now launched on what is suggested to be the platform of illegality. And, in that void is the cross-over from civil liability to criminal liability. Quite apart from the absence of firm evidence and even more worrying where the matters alleged were not even offered to the relevant witnesses in the course of examination of those witnesses with counsel offering evidence from the Bar, I am not in the least prepared to say that there have been violations of Act 577 to the extent of rendering the transactions illegal. This is dangerous and strikes at the heart of justice and fairness. In fact, as discussed earlier, the contention of the plaintiff that the transactions can and must necessarily be in hard cash is without basis. The engagement, if at all, of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 was never pleaded nor put to the witnesses. Of greater concern is the fact that what is under consideration are allegations of criminal violations of the Act where charges against particular persons need to be preferred, and the burden of proof is entirely different from the causes of action under scrutiny here. Neither the court nor the parties are here for that exercise. These matters are therefore totally disregarded.

Mistake Of Fact

[29] The plaintiff has further relied on s. 73 of the Contracts Act 1950 that monies paid under a mistake of fact must repay or return those monies. Section 73 reads as follow:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

[30] The argument here is that the plaintiff made the payment upon the honest assumption that it was a genuine application from Xian Jiang to the 1st defendant; that the payment was authorized by Xian Jiang. This was obviously a mistake as these

two entities have no relationship with each other as confirmed by the witnesses from Xian Jiang, and from the 1st defendant, DW1 and DW3. Aside from that, being forged remittance application forms, the lack of authorization is proved. Since the word "must" which is a stronger word than "shall" is used in s. 73, then where the existence of a mistake has been proved, it was contended that the 1st defendant must comply and return the monies (see *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329).

[31] The 1st defendant submitted that while s. 73 mandates the return of money paid under a mistake, it is not in every case that recovery is ordered. There may be particular cases where the plaintiff is disentitled from asking for the return, be it by reason of estoppel or otherwise as was reminded in *United Bank of India v. A.T. Ali Hussain & Co* AIR [1978] Cal 169:

> It is not correct to say that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitles a plaintiff by estoppel or otherwise …
>
> It is difficult to lay down the circumstances under which a plaintiff may be held to be debarred from recovering the money which he had paid under a mistake, but if the circumstances be construed as falling within the purview of the doctrine of estoppel or are such that it would be inequitable to allow the plaintiff to recover, the plaintiff must fail.
>
> So long as the *status quo* is maintained and the payee has not changed his position to his detriment he must repay the money back to the payer. If, however, there has been a change in the position of the payee who, acting in good faith, parts with the money to another without any benefit to himself before the mistake is detected, he cannot be held liable. Equity disfavours unjust enrichment. When there is no question of unjust enrichment of the payee by reaping the benefit of an 'accidental windfall' he should not be made to suffer, for he would be as innocent as the payer who paid the money acting under a mistake.

[32] The 1st defendant also submitted that it was just an innocent recipient or "conduit pipe" through which money passed to the real culprit and that no benefit had been received. It further claimed to have no knowledge of the scheme perpetrated by Leong/Wong. Therefore, the 1st defendant should not be held

accountable where the money earlier received had been dissipated. The House of Lords in *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548 similarly expressed its disfavor in ordering a return where injustice will result due to the change of position on the part of the innocent third party:

> … it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays the money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, *bona fide* change of position should of itself be a good defence in such cases as these. The principle is recognized throughout the common law world.

[33] Further, as far back as 1829, in *Cocks & Others v. Masterman & Others* [1829] 9 B & C 900, it was felt that a holder of a bill should not be deprived of any right or privilege by virtue of the negligence of the bankers who had paid under a mistake and ignorance of the fact that it was a forged acceptance. Such "holder should be entitled to know, on the day when it becomes due whether it is an honoured or dishonoured bill, and the parties who paid it cannot recover it back." Similar reservations were also expressed by Matthew J in *The London and River Plate Bank Limited v. The Bank of Liverpool, Limited* [1895] 1 QB 7, 11, on whether money paid under a mistake of fact could be recovered:

> If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business.

[34] It is quite obvious that the position under s. 73 of the Contracts Act 1950 is consistent with that under common law as established long ago in the case of *Kelly v. Solari* [1841] 9 M. & W. 54. Parke B's short and clear *dicta* in *Kelly v. Solari* was cited with approval by Goff J in *Barclays Bank Ltd v. W.J. Simms Son & Cooke (Southern) Ltd and Another* [1980] 1 QB 677, 687, that if money was paid under a mistake, it would be against good conscience to retain that money. Where there was no intention that the money should be retained once the truth is known regardless of there being want of due diligence, the money also must be returned:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it: … If indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the Plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.

[35] This principle had received strong support from the Privy Council in *Imperial Bank of Canada v. Bank of Hamilton* [1902] AC 49. In that case, one Bauer was a customer of the appellant bank. He drew a $5 cheque upon his bank. The word "five" was written but a considerable space was left between that word and the next words printed on the cheque. On the date of the cheque, Bauer took it to the appellant bank and got it marked or certified by the respondent bank's stamp. After that, he took it away with him and proceeded to write in the word "hundred" after the word "five". The cheque then appeared to be certified for $500. There was no doubt that the condition of the cheque afforded the opportunity for the fraudulent alteration. Bauer took the cheque as altered and took it to the appellant bank where he opened an account with that altered cheque. The cheque was placed to his credit and Bauer proceeded to draw from that account with that amount in credit. The altered cheque in the

meantime went through the clearing process and was cleared without incident. The fraud was not discovered till a day later. The respondent bank immediately gave notice to the appellant demanding a repayment of $495, being the amount paid by them in respect of the cheque less the $5 for which it was drawn and certified. There was no settlement and the action was brought to recover the $495. Three principal defences were launched: "... namely, 1st, because the Bank of Hamilton was negligent in marking the cheque with a blank in it; 2nd, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account; 3rd, because notice was not given to the Imperial Bank of Canada on 27 January, the day on which the cheque was paid." In other words, the appellant alleged that it was the respondent's negligence which facilitated the fraudulent insertion and although in possession of all material facts before them, failed or abstained from consulting their own books on presentation of the cheque which would "at once" have disclosed "the real facts". At p. 56 Lord Lindley speaking on behalf of the Privy Council and in dismissing the appeal, said:

> As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on January 27 it had the means of ascertaining from its own books that the cheque had been altered. But means of knowing and actual knowledge are not the same; and it was long ago decided in *Kelly v. Solari* (2) that money honestly paid by mistake of facts could not be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and their Lordships consider it applicable to the present case. There was nothing on the face of the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover, even if negligence in this respect could be imputed to the Bank of Hamilton, such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That had been done already. These were the reasons which induced the Courts below to decide against the second ground of defence; and their Lordships have no hesitation incoming to the same conclusion.

[36] It is noteworthy to observe that these cases just examined were in fact discussed in *National Westminster Bank Ltd v. Barclays bank International Ltd and another* [1974] 3 All ER 834. The issue under consideration there was whether a bank which had dishonored an apparently genuine cheque on which the signature

of its customer was in fact skillfully forged can recover the money from the payee of the cheque after he has acted to his detriment in direct reliance on the cheque having been honoured. After examining the decisions in *Kelly v. Solari, Cocks & Others v. Masterman & Others, The London and River Plate Bank Limited v. The Bank of Liverpool, Limited and Imperial Bank of Canada v. Bank of Hamilton* cases identified, Kerr J came up with several propositions, including the following:

i. that the bank owes no duty of care to the payee when considering whether to honour a customer's cheque where the form is proper and the customer's signature appears genuine;

ii. that "... the law should be slow to impose on an innocent party who has not acted negligently an estoppel merely by reason of having dealt with a forged document on the assumption that it was genuine".

iii. that the mere fact that the defendant has acted to its detriment by spending or paying away the money in reliance on having received the payment is not sufficient to bar the plaintiff's right to recover;

iv. that the mere payment on a forged cheque did not imply any representation by the plaintiff that the cheque was genuine so as to form the basis for the operation of the principle of estoppel against the plaintiff nor is it a bar to recovery under a mistake of fact.

[37] In laying down those propositions, his Lordship also recognized that there are exceptions to the rule that a plaintiff is entitled to recover money paid under a mistake even if there were means of discovering the mistake and even though the *status quo* of the defendant cannot be restored. At p. 852, Kerr J described that this would be where "... the plaintiff represented to the defendant that he might treat the money as his own, or if he was under a duty as against the payee to inform of the true state of account between them, or if the mistake was in some way induced or contributed to by the payee ..." A similar analysis was conducted by Goff J in *Barclays Bank Ltd v. W.J. Simms Son & Cooke (Southern) Ltd and Another* where his Lordship then opined that a person who has paid another under a mistake may lose the right to recover where the payer intends the payee to have the

money at all events, whether the fact is true or false; or the fact has been deemed in law so to intend. That right is also denied where there is good consideration, especially in discharging a debt owed; or there has been a change of position in good faith; or is deemed in law to have done so.

[38] The position locally is the same. In *Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim* [1998] 2 CLJ Supp 332, Nik Hashim J (as his lordship then was) similarly opined that "… neither the knowledge by the bank of the insufficient funds in PW4's account to cover the cheque nor the mistake due to the negligence of the bank in paying the cheque is a bar to the bank's claim under s. 73 and under the common law on 'money had and received'." At p. 340, his Lordship was clear that "It is settled law that in an action for the recovery of money paid under mistake, the bank's negligence is irrelevant. Further on at p. 342, his Lordship unequivocally found that. In the particular circumstances of this case, it is not right for the respondent to keep the money. He is bound by the ties of natural justice and equity to refund the money to the bank. There is no evidence to show that the respondent has altered his position in a manner rendering it inequitable that he should repay the money." In such a circumstance, his lordship had clearly opined the settled position that for a claim grounded in payment paid under a mistake, the issue of negligence on the part of the plaintiff is irrelevant.

[39] From the 1st defendant's submissions, it is quite apparent that the 1st defendant too, is not advocating that there can never be refund where such monies had been paid under a mistake. That will surely conflict with the clear statutory enunciation of what is the settled principle under both common law and statute; that there must be refund or repayment. However, it cannot be disputed that the right to require a refund can be denied in certain limited circumstances, particularly where there is estoppel, or where innocent third parties are involved, or when there has been a change of position on the part of the innocent party. The circumstances are not limitless and neither is it finite. Even in *Lipkin Gorman v. Karpnale Ltd*, 580, Lord Goff of Chieveley was cautious that the defence to actions of restitution should be allowed to develop "on a case to case basis, in the usual way. It is of course plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid

away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer". To sum up, in the absence of evidence suggesting any of the following (the list is by no means exhaustive), the recipient of monies paid under a mistake must return such monies:

(i) where the money is intentionally paid regardless of the truth and the recipient is to retain the money in any event;

(ii) where there is good consideration; or

(iii) where there has been a *bona fides* change of position.

[40] I have carefully scrutinized and weighed the facts, both oral and documentary evidence, and considered the submissions of both counsel on this issue. Upon so doing, I agree that there are serious concerns as to the way DW3 or Pyramid Triways conducted the relevant transactions, particularly in the issue of a receipt or acknowledgment. But, that is with regards Leong/Wong. Reasonable conduct especially where large sums are involved would surely require an issuance of such a receipt or acknowledgment. Yet, none was asked and none appears to have been offered. While this is somewhat unusual, it is insufficient to construe collusion or mala fides on the part of DW1 or the 1st defendant with DW3 or Pyramid Triways. If there is any impropriety, it would be on the part of DW3 who is however, not a party to the present proceedings. On the other hand, the 1st defendant is a party. It is difficult in these circumstances for the court to impute the act or conduct of DW3 on DW1 and thereby the 1st defendant. The 1st defendant's dealings were with Pyramid Triways and not with Leong/Wong; and Leong/Wong's dealings were with Pyramid Triways or DW3 and not with the 1st defendant.

[41] Be that as it may, with respect, I disagree that the 1st defendant was a mere conduit or innocent bystander unaware of the happenings at DW3's end. The 1st defendant was a party to transactions which were very much part and parcel of its business existence. It certainly derived benefit in that it received payment for the transaction. That payment would undoubtedly involve an element of profit for the exchange purchases that the 1st defendant had contracted with Pyramid Triways. As far as the 1st

defendant is concerned, it was supposed to receive payment from Pyramid Triways. It did not. The payment was from Xian Jiang who played no part in the transactions and had no intention to pay or have any obligation, legal or otherwise to pay the 1st defendant. To allow the 1st defendant to retain the monies would, in my mind, undoubtedly give the 1st defendant monies to which it had no right to, amounting to an unjust enrichment. In such circumstances, I do not find any alteration of its position such as to deny the remedy sought or the presence of consideration.

[42] In contrast, I find that not only is there no evidence but no suggestion by the plaintiff to the 1st defendant that the money paid into its account may be treated as the 1st defendant's. Just because the plaintiff paid into the 1st defendant's account does not amount to representation that the monies paid in were or are the 1st defendant's. The doctrine of estoppel is therefore not engaged. Further, I agree with learned counsel for the plaintiff that the sale to Pyramid Triways or DW3 of the foreign currencies is not a bar to this claim. The sale of the foreign currencies does not spell a change in position and the 1st defendant has not given or parted with the monies received to a third party who is *bona fide* and from whom he cannot seek a refund. The elusive Leong/Wong is obviously not an innocent party.

[43] I am satisfied that the monies were paid into the 1st defendant's account under the influence of a mistake and upon the supposition that Xian Jiang intended the 1st defendant to be paid. It is clear that had the true facts been known, such payment would not have been made. In such circumstances, those monies paid may be recovered. This is regardless of how careless or negligent the plaintiff may have been in inquiring into the truth of the mandate to pay the 1st defendant. In fact, it may also be argued that the payment into the 1st defendant's account was one without the requisite mandate of Xian Jiang. So, not only did the plaintiff not intend the 1st defendant to receive the monies, it is not in dispute that Xian Jiang has no relationship with the 1st defendant. Clearly, Xian Jiang could not have and did not intend the 1st defendant to have or retain the monies received. Bearing in mind that Xian Jiang is not a customer of the 1st defendant, there is absolutely no reason for Xian Jiang to be paying the 1st defendant any money. In fact, the party that owes the 1st defendant is actually Pyramid Triways as it is the party that

bought the foreign currencies from the 1st defendant on all three occasions; not Xian Jiang. Leong/Wong may have paid the monies into the 1st defendant's account in the manner described by DW1 and DW3; he nevertheless bought from DW3 or Pyramid Triways, not from the 1st defendant.

[44] The plaintiff is further not under a duty to inform the 1st defendant as to the true state of the account between them since the 1st defendant is not its customer. Certainly, there is evidence that the mistake was in some way induced or contributed to by the 1st defendant by the way it conducted its business where it allowed third parties to make direct payments into its account in transactions involving itself and Pyramid Triways. Strictly speaking those monies ought to have been paid to Pyramid Triways who will in turn, pay the 1st defendant. In any case, the mere fact that the plaintiff paid on a forged form does not imply any representation that the form was genuine nor does it amount to negligence.

[45] In the circumstances, the 1st defendant is not entitled to retain the monies mistakenly paid into its account and the plaintiff is entitled to a repayment of those monies. For the sake of completeness, it is observed that the transactions in question not being that involving negotiable instruments, the decisions in *Cocks v. Masterman* and *The London and River Plate Bank* have no application.

Money Had And Received

[46] Finally, the plaintiff's claim is founded on the basis of money had and received. In *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd, New Hebrides (in liquidation)* [1987] 2 MLJ 57, where the decision of Gunn Chit Tuan J (as his Lordship then was) was set out, the Supreme Court refused to interfere in his lordship's decision as it was not convinced "that the learned judge has erred in law or in fact in coming to his decision". In his decision, Gunn Chit Tuan J had referred to the submissions of the plaintiff's counsel who cited several authorities in support of his arguments for repayment of monies. Those arguments may be said to have found favour with the Supreme Court. At p. 64, Gunn Chit Tuan J said:

Next, on money had and received, counsel referred to the views of Lord Haldane LC speaking for the Judicial Committee in *Royal Bank of Scotland v. Rex* when he said:

> It is a well-established principle of the English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use.

[47] It is beyond dispute that the monies in question belong to Xian Jiang who never had any intention that the 1st defendant was to receive those monies or having received them, keep those monies. Xian Jiang never applied to remit any monies to the 1st defendant as they have no dealings with the 1st defendant. The witnesses from Xian Jiang, PW2, PW3 and PW4 had all confirmed that they also do not know the 1st defendant. From the testimony of DW1, it may also safely be concluded that the 1st defendant was not claiming that it was dealing with Xian Jiang. It was dealing with Pyramid Triways. In such circumstances, there was no mandate for the plaintiff to pay Xian Jiang's monies to the 1st defendant. That being so, I agree with the submissions of learned counsel for the plaintiff that since neither Xian Jiang nor the plaintiff had ever intended the 1st defendant was to keep and use the monies received which was not the 1st defendant's in the first place, the 1st defendant must return those monies to Xian Jiang, or to the plaintiff.

Conclusion

[48] In my judgment, after evaluating and deliberating on all evidence led, testing the oral and documentary evidence against each other, and having fully considered all the oral and written submissions put forward by both counsel, and for the reasons already highlighted above, I am satisfied that the plaintiff has proved its claim on the balance of probabilities. Accordingly, I allow the plaintiff's claim with costs of RM50,000.